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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3602

JOYCE E. JENNINGS, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

BARTLEY, *Judge*: Joyce E. Jennings, surviving spouse of veteran Michael R. Jennings, appeals through counsel a June 30, 2015, Board of Veterans' Appeals (Board) decision denying service connection for esophageal cancer for accrued benefits purposes and service connection for the cause of the veteran's death. Record (R.) at 3-13. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will set aside the June 2015 Board decision and remand the matters for further development and readjudication consistent with this decision.

I. FACTS

Mr. Jennings served on active duty in the U.S. Army from May 1969 to April 1971, including service in Vietnam from May 1970 to April 1971. R. at 253. In March 2012, he filed a claim for service connection for esophageal cancer. R. at 433-51; *see* R. at 169-76. He died two months later from that condition. R. at 415 (death certificate listing cause of death as esophageal cancer).

In June 2012, Mrs. Jennings filed a claim for VA "death benefits." R. at 403; *see* R. at 387-94. In October 2012, a VA regional office (RO) denied service connection for esophageal cancer

for accrued benefits purposes and entitlement to dependency and indemnity compensation (DIC) based on service connection for the cause of the veteran's death. R. at 127-35. Mrs. Jennings filed a timely Notice of Disagreement as to that decision later that month, R. at 371; the RO issued a Statement of the Case continuing to deny those claims in December 2013, R. at 36-67; and she timely perfected an appeal to the Board the following month, R. at 34-35.

At a December 2014 Board hearing, Mrs. Jennings testified that her husband served in an herbicide "hot spot" in Vietnam and that he had none of the other medically acknowledged risk factors for esophageal cancer, such as acid reflux, obesity, smoking, or heavy drinking. R. at 306-07. She expressed frustration with VA physicians who would not provide a medical opinion regarding the etiology of the veteran's cancer because it was not included on the list of diseases presumed to be associated with herbicide exposure. R. at 308. The presiding Board member acknowledged the difficulty of obtaining a medical opinion regarding direct service connection based on herbicide exposure, but stated: "If you do find a doctor, . . . the things you could talk to him about are the level, the things you've testified about. I think the levels of exposure, where he was in Vietnam, he had greater than maybe the average exposure for these specific reasons, [and] the latency period between his time in service and the onset of esophageal cancer." *Id*. The Board member encouraged Mrs. Jennings to try to obtain a medical linkage opinion that "explain[s] sort of why, if you can find a doctor who does study the evidence and believes that it is as likely as not that the esophageal cancer was the result of this herbicide exposure that your husband was presumed to have had, the why is important in this case." R. at 309-10. The Board member agreed to hold the record open for 90 days for her to submit such evidence. R. at 304-05, 310-11.

Mrs. Jennings did not submit additional evidence after the hearing and, in June 2015, the Board issued the decision currently on appeal. R. at 3-13. As relevant here, the Board acknowledged that VA had not obtained a medical opinion in this case but found that VA had nevertheless satisfied its duty to assist because "no evidence ha[d] been submitted suggesting that the [v]eteran's esophageal cancer was the result of military service" other than his presumed exposure to herbicides in service and because, "[w]ithout any competent evidence linking the [v]eteran's esophageal cancer to his military service, VA has no duty to seek a medical opinion." R. at 7-8. The Board denied service connection for esophageal cancer for accrued benefits purposes because the

record did not contain competent evidence linking that condition to in-service herbicide exposure, R. at 8-11, and it denied entitlement to DIC because the veteran was not service connected for any disability, including esophageal cancer, at the time of his death, R. at 11-13. This appeal followed.

II. ANALYSIS

A. DIC

Mrs. Jennings principally argues that the Board erred in its determination that VA was not required to provide a medical linkage opinion in connection with her DIC claim because it applied the wrong standard when assessing the issue. She further contends that, under the proper standard, she is entitled to a VA medical linkage opinion as to whether the cause of the veteran's death was service connected. Appellant's Brief (Br.) at 4-8; Reply Br. at 1-4. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 6-22. Mrs. Jennings's arguments are persuasive.

Pursuant to 38 U.S.C. § 1310, DIC is paid to the surviving spouse of a qualifying veteran who died from a service-connected disability. A death will be considered service connected where a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a) (2016). A disability is the principal cause of death when that disability, "singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto." 38 C.F.R. § 3.312(b). To be a contributory cause of death, the disability must have "contributed substantially or materially" to death, "combined to cause death," or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(c)(1).

Veterans—such as Mr. Jennings—who served in Vietnam between January 9, 1962, and May 7, 1975, are presumed to have been exposed to herbicide agents, such as Agent Orange, unless there is affirmative evidence to the contrary. 38 U.S.C. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6)(iii) (2016). Certain diseases are presumptively service connected if a veteran was exposed to herbicides. 38 C.F.R. § 3.309(e) (2016); *see* 38 C.F.R. § 3.307(a)(6) (listing conditions). Esophageal cancer is not on the list of presumptive herbicide-related diseases, but, even for a veteran who does not meet the criteria governing herbicide exposure and service connection on presumptive bases, service

connection may nevertheless be established on a direct basis. *See Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994).

The Secretary has a duty to assist claimants in developing their claims. 38 U.S.C. § 5103A. For DIC claims, that duty includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate [the DIC claim]," which, in some cases, may include obtaining a VA medical opinion addressing the cause of the veteran's death. 38 U.S.C. § 5103A(a)(1); *see DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008) (holding that the duty-to-assist provisions of section 5103A(a), rather than of 5103A(d), apply to DIC claims). Thus, VA must provide a medical opinion where (1) the claimant requests assistance in obtaining a medical opinion, (2) the provision of a medical opinion is necessary to substantiate the claim for benefits, and (3) there exists a reasonable possibility that such assistance would in fact aid in substantiating the claim. *See Wood v. Peake*, 520 F.3d. 1345, 1348 (Fed. Cir. 2008). "The statute only excuses . . . VA from making reasonable efforts to provide such assistance, if requested, when 'no reasonable possibility exists that such assistance would aid in substantiating the claim.'" *Id.* (quoting 38 U.S.C. § 5103A(a)(2)). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) was pellucid that no evidence of any indication that the disability or symptoms may be associated with service was necessary. *Id.* at 1350-51 (stating that subsections (a) and (d) of section 5103A "apply wholly different and unrelated requirements"). The Court reviews the Board's determination that, as part of the duty to assist, a VA medical examination or opinion is not warranted in a DIC claim under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In the present case, the Court agrees with Mrs. Jennings that the Board imposed a higher standard for entitlement to a VA medical opinion than set forth in section § 5103A(a) and that the criteria for triggering VA's duty to provide such an opinion under that section were otherwise met. Appellant's Br. at 5-8. Initially, there is no dispute that the first two *Wood* elements for establishing entitlement to DIC are met. At the December 2014 hearing, Mrs. Jennings made clear that she

needed assistance in obtaining a medical opinion, advising the Board member that she had asked the VA physicians for linkage opinions, but that they declined. R. at 308. Also, the Board member conducting the hearing plainly indicated that a medical linkage opinion was necessary to substantiate the claim for service connection for the cause of the veteran's death and, hence, DIC. R. at 308-10. The parties' dispute centers on the third *Wood* element.

The Board acknowledged *DeLaRosa* and the "reasonable possibility" standard, but then shortly thereafter stated that VA had no duty to seek a medical linkage opinion because there was no *competent evidence linking* the veteran's esophageal cancer to service. R. at 7-8. This statement indicates that the Board was not applying the correct standard when assessing entitlement to a VA linkage opinion; section 5103A(a) does not require evidence of a link between the cause of death and service before a VA opinion is provided. Moreover, the Board erred when it concluded that there was nothing of record other than the veteran's presumed exposure to herbicides evidencing a reasonable possibility that a VA opinion would aid in substantiating the claimed link between esophageal cancer and service. Mrs. Jennings testified at the December 2014 Board hearing that the veteran did not have medically acknowledged risk factors for esophageal cancer, such as acid reflux, obesity, smoking, or heavy drinking. R. at 306-07. Presuming Mrs. Jennings's description of the veteran's medical history is accurate—and the Board made no finding disputing its accuracy or her credibility—this testimony indicated that a medical opinion addressing the likelihood that the veteran's in-service herbicide exposure caused esophageal cancer, absent those risk factors, had a reasonable possibility of substantiating the DIC claim.

Relying on *DeLaRosa* and *Wood*, the Secretary contends that any Board error in this regard is harmless. Secretary's Br. at 14-16. In *DeLaRosa*, the Federal Circuit held that error in failing to assess the DIC claimant's entitlement to a VA medical opinion under section 5103A(a) was harmless because there was no competent evidence that the veteran even had post-traumatic stress disorder, which the veteran's surviving spouse had alleged caused his suicide, and, therefore, no reasonable possibility that a medical opinion would assist in substantiating the claim. 515 F.3d at 1322. In *Wood*, the Federal Circuit emphasized this as the basis for *DeLaRosa*'s harmless-error holding but found that similar error in the case before it was not harmless because, unlike *DeLaRosa*, the record in *Wood* was not devoid of any competent evidence of the condition alleged to have caused death

and instead contained disputed evidence of such. *Wood*, 520 F.3d at 1350-52. According to the Secretary, because there is no evidence of record beyond Mrs. Jennings's lay assertions relating the cause of the veteran's death to service, the third *Wood* element has not been met and any Board error in finding a VA medical linkage opinion unwarranted was harmless. Secretary's Br. at 16-17. The Court disagrees.

Unlike in *DeLaRosa*, there is no dispute that the veteran here suffered from a diagnosed illness—namely, esophageal cancer—and that this illness was the cause of his death. R. at 415; *see also* R. at 5. Moreover, Mrs. Jennings's December 2014 testimony was not a mere assertion of lay belief as in *DeLaRosa*. Mrs. Jennings identified several medically acknowledged risk factors for esophageal cancer—such as obesity, smoking, heavy drinking, and acid reflux—and gave lay testimony, based on her lay observation of the veteran, that prior to developing esophageal cancer he had been an energetic, healthy individual throughout their 22-year marriage, other than having an occasional head cold. R. at 306-307. In other words, she provided evidence based on her long-term relationship with him that he suffered none of the usual risk factors for esophageal cancer in that he was not obese, did not smoke, did not drink heavily, and did not complain of digestive problems. *Id.* Mrs. Jennings was competent to report her understanding that there are certain medically recognized risk factors for esophageal cancer and her observation that the veteran did not suffer these risk factors, and the Court concludes, consistent with *Wood*, that the Board error in this case is not harmless. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that a lay person is competent to repeat a medical diagnosis and report observable symptoms).

Indeed, not only has the Court found that the Board failed to properly analyze the issue of entitlement to a VA medical opinion under section 5103A(a), but the Court is firmly convinced that, based on the December 2014 testimony Mrs. Jennings provided and the fact that the veteran was presumed exposed to herbicides while in service, the Board clearly erred in finding that there was no reasonable possibility that a linkage opinion would aid in substantiating the DIC claim. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *see also Nolen*, 14 Vet.App. at 184; *Hersey*, 2 Vet.App. at 94. Accordingly, the Court will reverse the Board finding that a VA medical opinion as to whether the cause of the veteran's death was service connected was not warranted, set

aside the Board decision in this regard, and remand the matter for additional development and readjudication consistent with this decision.

B. Accrued Benefits

Mrs. Jennings argues that, to the extent that the Court concludes that the issue of service connection for the cause of the veteran's death for DIC purposes must be remanded for the provision of a VA medical linkage opinion, the Court should likewise set aside the Board decision with respect to the issue of service connection for esophageal cancer for accrued benefits purposes because the two matters are inextricably intertwined. Appellant's Br. at 8-9. The Court agrees.

"[I]n the interests of judicial economy and avoidance of piecemeal litigation," claims that are "intimately connected" should be adjudicated together. *Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001). Put another way, "where a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and a waste of judicial resources, the two [issues] are inextricably intertwined." *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (internal quotations marks and alterations omitted)). Here, because a VA medical linkage opinion for DIC purposes will address whether the veteran's esophageal cancer was at least as likely as not related to service, and because such an opinion is critical to Mrs. Jennings's claim for accrued benefits, the Court concludes that the matters are inextricably intertwined and that the accrued benefits claim must be remanded as well.

Mrs. Jennings is free on remand to present to the Board any additional arguments and evidence in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the Board determination in the June 30, 2015, decision that a VA medical linkage opinion is not warranted is REVERSED. The decision is SET ASIDE,

and the matters are REMANDED for additional development and readjudication consistent with this decision.

DATED: November 30, 2016

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